



0000106565

ORIGINAL

BEFORE THE ARIZONA CORPORATION COMMISSION

2010 JAN -7 A 8:57

COMMISSIONERS

KRISTIN K. MAYES, Chairman
GARY PIERCE
PAUL NEWMAN
SANDRA D. KENNEDY
BOB STUMP

ARIZONA CORPORATION COMMISSION
DOCKET CONTROL

In the matter of:

DOCKET NO. S-20714A-09-0553

THEODORE J. HOGAN & ASSOCIATES,
LLC a.k.a. TED HOGAN AND
ASSOCIATES, an Arizona limited liability
company,

**RESPONSE TO REQUEST-ORDER FOR
DISCOVERY-ANSWER**

THEODORE J. HOGAN a.k.a. TED KILLS
IN THE FOG, a married man

and

CHRISTINA L. DAMITIO a.k.a.
CHRISTINA HOGAN, a married woman

Respondents.

Arizona Corporation Commission

DOCKETED

JAN -7 2010

DOCKETED BY

I. Procedural History

On December 8, 2009, the Securities Division of the Arizona Corporation Commission ("Commission") filed a Notice of Opportunity for Hearing Regarding Proposed Order to Cease and Desist, Order For Restitution, Order for Administrative Penalties and for Other Affirmative Action ("Notice") against Respondents Theodore J. Hogan & Associates LLC ("Hogan & Associates"), Theodore J. Hogan ("Hogan") and Christina L. Damitio ("Damitio").

On December 22, 2009, Respondents Hogan & Associates LLC and Damitio filed a Request-Order for Discovery-Answer.

...

...

II. Response

The Respondents' request is essentially a request for pre-hearing discovery. The Respondents are entitled to due process. They are not allowed free access to the Securities Division's investigative file. A.A.C. R14-3-104 reiterates a respondent's rights set forth in § 41-1061, by stating: "At a hearing a party shall be entitled to enter an appearance, to introduce evidence, examine and cross-examine witnesses, make arguments, and generally participate in the conduct of the proceeding." A Procedural Order will set forth the requirements for both parties to disclose their witness and exhibits list to the other party on a specified date.

The Respondents are entitled to due process in this matter. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 96 S. Ct. 893 (1976) quoting *Armstrong v. Manzo*, 380 U.S. 545 (1965). There is no basic constitutional right to pretrial discovery in administrative proceedings. *Silverman v. Commodity Futures Trading Commission*, 549 F.2d. 28, 33 (7th Cir. 1977); *See also Starr v. Commissioner of Internal Revenue*, 226 F.2d. 721,722 (7th Cir. 1955), cert. denied, 350 U.S. 993, 76 S.Ct. 542 (1955); *National Labor Relations Board v. Interboro Contractors, Inc.*, 432 F.2d 854, 857 (2nd Cir. 1970); *Miller v. Schwartz*; 528 N.E.2d 507 (N.Y. 1988). "[T]he evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. ... We have formalized these protections in the requirements of confrontation and cross-examination." *Green v. McElroy*, 79 S. Ct. 1400 (1959). "The Constitution does not require that a respondent in an administrative proceeding be aware of all evidence, information and leads to which opposing counsel might have access." *Pet v. Dept. of Health Services*, 207 Conn. 346, 542 A.2d 672 (1988) quoting *Federal Trade Commission v. Anderson*, 631 F.2d 741, 748 (D.C. Cir. 1979). "This does not mean that a party can be denied due notice of the hearing, the right to produce relevant evidence, the right to cross-examine witnesses produced by his adversary, and the right to be fairly apprised of the facts upon which the agency will act." *Id.*

1 The legislature has mandated that contested cases before the Arizona Corporation
2 Commission ("Commission") are governed by Arizona Revised Statutes. See A.R.S. §§ 41-1067
3 and 41-1092.02(A)(4). Specifically, A.R.S. § 41-1061(A)(1) states: "Every person who is a party
4 to such proceedings shall have the right to be represented by counsel, to submit evidence in open
5 hearing and shall have the right of cross-examination." Also, A.R.S. § 41-1062(A)(4) states:
6 "Prehearing depositions and subpoenas for the production of documents may be ordered by the
7 officer presiding at the hearing, provided that the party seeking such discovery *demonstrates* that
8 the party has *reasonable need* of the deposition testimony or materials being sought. . ."

9 Notwithstanding the provisions of section 12-2212, no subpoenas, depositions or other discovery
10 shall be permitted in contested cases *except as provided by agency rule or this paragraph.*"

11 Emphasis added. The Commission has specific rules related to discovery. See A.A.C. Rule R14-3-
12 101 et seq.

13 Respondents have the right to cross-examine the witnesses against them. Further,
14 Respondents have the ability, pursuant to A.A.C. Rule R14-3-109(O), to subpoena those witnesses
15 that they believe have testimony relevant to the allegations in the Notice.

16 Other than the exchange of a witness list and the exhibits, "[t]here is no basic constitutional
17 right to pretrial discovery in administrative proceedings." *Silverman v. Commodity Futures*
18 *Trading Commission*, 549 F.2d 28 (7th Cir. 1977). Respondents will receive the Securities
19 Division's witness and exhibit list prior to the scheduled hearing as ordered by the Administrative
20 Law Judge.

21 **III. Conclusion**

22 The Notice sets forth the allegations against the Respondents. The witness and exhibit list
23 will provide information about who will testify and what documents support the allegations in the
24 Notice. The Respondents will have ample opportunity to review the exhibits to prepare for the
25 upcoming hearing. The Respondents will have the opportunity to cross-examine the Securities
26 Division's witnesses and present their own witnesses. All necessary information will be provided

1 on the date set forth by the Administrative Law Judge pursuant to a Procedural Order. The
2 Respondents are not entitled to the investigative file maintained by the Securities Division.
3 Respondents Hogan & Associates' and Damitio's request for discovery should be denied.

4 Respectfully submitted this 76th day of January, 2010.

5
6 By:


Wendy Coy
Senior Counsel for the Securities Division of
the Arizona Corporation Commission

1 ORIGINAL AND THIRTEEN (13) COPIES of the foregoing
2 filed this 7th day of January, 2010 with:

3 Docket Control
4 Arizona Corporation Commission
5 1200 W. Washington St.
6 Phoenix, AZ 85007

7 COPY of the foregoing hand-delivered
8 filed this 7th day of January, 2010 to:

9 Mr. Marc E. Stern
10 Administrative Law Judge
11 Arizona Corporation Commission/Hearing Division
12 1200 W. Washington St.
13 Phoenix, AZ 85007

14 COPY of the foregoing mailed
15 this 7th day of January, 2010 to:

16 Theodore J. Hogan
17 460 Andante
18 Sedona, Arizona 86336

19 Theodore J. Hogan & Associates, LLC
20 460 Andante
21 Sedona, Arizona 86336

22 Christina L. Damitio
23 460 Andante
24 Sedona, Arizona 86336

25 Veronica Sandoval
26